IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7977 OF 2004

Dattaram Ganpat Toraskar..... Petitioner.

Versus

Madhukar Chhagan Patkar & Anr..... Respondents.

-: ALONG WITH :-

WRIT PETITION NO. 7978 OF 2004

Dattaram Ganpat Toraskar..... Petitioner.

Versus

Madhukar Chhagan Patkar & Anr..... Respondents.

Mr.D. S. Sawant for the Petitioner.

None for the Respondents.

CORAM : R.M.S.KHANDEPARKAR, J.

DATED : 28TH SEPTEMBER, 2004.

P.C.:

Since common questions of law and facts arise in both the petitions and they arise from common judgment and order and the parties to both the petitions are

also common, both the petitions were heard together and are both disposed of by this common order.

2. Heard Advocate for the petitioner. Perused record.

3. The petitioner challenges the impugned judgment and decree for eviction dated 4th February 2004 passed by the lower Appellate Court while setting aside the decree of dismissal of the suit dated 25th January 2000 which was passed by the trial Court. The eviction has been ordered on the ground that the petitioner had committed default in payment of rent and the case in that regard was duly established by the respondents.

4. The impugned judgment is sought to be challenged on two grounds. Firstly, that the finding about the nonpayment of rent arrived at by the lower Appellate Court is contrary to the materials on record in as much as that the trial Court on assessment of the evidence had clearly held that there was no cause of action in favour of the respondents, even for the issuance of notice regarding default in payment of

rent as, the rent claimed, had already been tendered under Money Order and it was refused by the respondents. The second ground of challenge relates to the finding of the lower Appellate Court regarding failure on the part of the petitioner to comply with the provisions of Section 23 of the Bombay Rents, Hotel & Lodging House Rates Control Act, 1947, hereafter referred to as "the Bombay Rent Act", in order to enable him to claim right to deduct the expenses incurred for the repairs. It is sought to be contended on behalf of the petitioner that there was a clear permission granted by the landlord to carry out repairs by the petitioner tenant which disclosed agreement between the parties in that regard and therefore the provisions of Section 23 of the Bombay Rent Act were not attracted. In that regard reliance is sought to be placed in the decision of the learned single Judge of this Court in the matter of **Sukchand Hemchand Shrawagi v/s Ramdas Shankar Shukla,** reported in 1987 Mah. R.C.J. 694.

5. As regards the ground pertaining to the default in payment of rent, undisputedly, the trial Court had rejected the contention of the respondents landlord

solely on the basis of Exh. 8 which is a communication of Money Order. The trial Court referring to the said Exh.8 had held that the same is a money order coupon and discloses tender of rent and the refusal thereof by the landlord. It was also observed that it was dated 6th January, 1981, whereas notice of demand under Section 12(3) of the Bombay Rent Act was dated 17th July, 1981. The lower Appellate Court refering to Exh.8 has clearly observed that undoubtedly it is a money order coupon but it does not establish tender of money under the money order nor it establishes the date of tender of amount. The said finding is clearly borne out from the evidence on record, the copies of which are placed on record by the petitioner along with the petitions, and the same discloses that while the petitioner was in the witness box a specific suggestion was made to the petitioner on behalf of the landlord that there was no rent tendered by money order while referring to Exh.8. Undoubtedly, apart from producing the said money order coupon, the petitioner has not examined any postal authority nor has produced postal receipt disclosing remittance of amount of money order with reference to Exh.8. It is also not in dispute that the money order

coupon, Exh.8, does not contain any postal stamp in relation to date of 6th January, 1981 but the date was written by the party himself. In other words, there was no cogent evidence on record to establish that the petitioner had in fact tendered the amount which the petitioner claims to have been tendered under Exh.8. In the absence of proof of the contents of Exh.8, that in fact the petitioner had remitted the amount under Exh.8, and that it was remitted on 6th January 1981 no fault can be found with the finding arrived at by the lower Appellate Court regarding absence of tender of money by money order. Hence, there is no substance in the first ground of challenge.

6. As regards the second ground of challenge, undisputedly, there was no notice sent by the petitioner in terms of provisions of law under Section 23 of the Bombay Rent Act in relation to the need of repairs to the premises. Referring to the pleadings in paragraph 2 of the written statement of the petitioner, which was filed in the trial Court, it was sought to be contended that it was specifically pleaded by the petitioner that the plaintiff was requested from time to time to carry out repairs to

the suit premises and to make suit premises tenable and the plaintiff had refused to do so and had informed the petitioner that he was not interested in doing so and that he may himself carry out the repairs and recover the amount spent towards repairs from the rent. There cannot be any dispute that once landlord and tenant enter into an agreement either in writing or oral that the tenant may repair the premises and deduct the expenses from the rent amount, certainly, the provisions of Section 23 of the Bombay Rent Act may not be attracted as regards the requirement in relation to the service of notice, which is otherwise contemplated under Section 23 (2) of the Bombay Rent Act. In Sukchand Hemchand Shrawagi (**supra**) the learned single Judge has clearly observed in paragraph 5 that "the Courts below have come to the concurrent finding of fact that there was an agreement between the plaintiff and the defendant that the defendant should keep the premises in good repairs and the liability to that extent placed by Section 23(1) of the Bombay Rent Act on the plaintiff was transferred to the shoulder of the defendant". Referring to the finding by the trial Court in paragraph 7 of its judgment, it was sought to be contended that there was

an agreement between the parties permitting the petitioner to carry out repairs and to deduct expenditure in that regard from the rent amount. However, paragraph 7 of the judgement of the lower Appellate Court reads thus:

> "So as to give our findings on the said issue, we have gone through the Section 23A of the Bombay Rent Act. After perusal of Section 23A of the Bombay Rent Act, we find that in order to get the benefit of provisions of Section 23A of the Bombay Rent Act the tenant has to issue a notice to the landlord for repairs and if the landlord fails to carry out the repairs then the tenants are entitled to carry on those repairs. After carrying on those repairs, the tenant is entitled to deduct or recover the expenses from the rent. However, in one year the said deduction shall not exceed 1/4th of rent by the tenant in that year. It is also further laid down that for the purpose of calculating the expense of the

repairs the account together with vouchers should be maintained by the tenants and those account vouchers shall conclusive the evidence of such expenditure. In the present case the defendant has not produced a single iota of evidence to show the account and vouchers were maintained by him towards the alleged repairs. He has also put forth the case that he has already furnished those account and vouchers to the Plaintiff. As such in the absence of vouchers, it is very difficult to believe and conclude that the particular amount was expended by the tenant. The defendant in this case for the repairs of the building. Apart from this it is necessary to mention here that the arrears of rent are from September 1980 to June 1981. At this juncture we would like to refer Exh.7. According to the tenant, the defendant by the said exhibit permission was given to him to repair the suit premises. Apart from the genuineness and correctness of this exhibit we find that this exhibit does not show any

> date. Simply it shows that the permission was given. However, this exhibit does not disclose that the brother of the plaintiff agreed that the tenant shall be entitled to deduct the rent amount from those expenses, and as such this document is not sufficient to show that there was agreement to deduct the expenses."

7. Above quoted paragraph nowhere discloses any specific finding regarding agreement between the parties as regards the permission to carry out repairs and to deduct expenditure from the rent amount. Undoubtedly, the lower Appellate Court in the impugned Judgment has observed that the brother of the Plaintiff had given writing under Exh.7 permitting the petitioner to carry out repairs but there was no agreement regarding deduction of expenses from the rent amount. Apart from the said finding, provisions of law under Section 23(2) of the Bombay Rent Act permits the tenant to deduct in any year the amount to the extent of 1/4th of the annual rent amount. In the case in hand the demand of arrears was for ten months amounting to Rs.150/-. The expenditure for the

repairs which was incurred was amounting to Rs.2,000/-. Obviously, even assuming that there was agreement permitting petitioner to carry out repairs, the deduction which was legally permissible was 1/4th of the annual rent amount. Once, the annual rent amount was shown to be Rs.180/- certainly, the petitioner could not have deducted more than Rs.45/- in a year out of the total amount incurred for repairs of the premises. It is not the case of the petitioner that the deduction was in accordance with the said provisions of law. Undoubtedly, the petitioner has not been able to establish about any agreement between the parties permitting the petitioner to deduct entire expenditure contrary to the entitlement under the provisions of Section 23 of the Bombay Rent Act relating to the maximum amount that can be deducted in relation to the expenditure from the rent amount.

8. It is also sought to be contended that the finding by the courts below that the suit premises do not fall within the slum area is perverse. Undisputedly, the petitioner has not been able to establish that the suit premises are situated in any particular slum area. In the absence of any such evidence, the burden

of which was on the petitioner, the finding arrived at by the court below regarding premises not being situated in any of the slum area, cannot be found fault with. The said finding is not a purely question of law but essentially a finding based on the materials to be placed on record. The contention raised by the Petitioner and the petitioner having failed to place any material in support of his contention in that regard, no fault can be found with the said finding.

9. For the reasons stated above, therefore petitions fail and are hereby dismissed. No order as to costs.

10. At the oral request of the learned Advocate for the petitioner, time to vacate the premises is extended till 31st January, 2005, subject to the petitioner along with all the major persons residing in the premises filing undertaking before the Registrar (Judicial) of this Court assuring that they will deliver the vacant and peaceful possession of the suit premises on or before 31st January, 2005 and will not induct any third person nor create any third party interest therein till then. The undertaking to be

filed within three weeks from today.

11. Issuance of certified copy expedited.

Sd/-

(R.M.S.KHANDEPARKAR, J.)